

2008

Seadhna J. Flores vs. David G. Earnshaw: Brief of Appellee

Utah Court of Appeals

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Michael F.Olmstead; attorney for appellee.

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SEADHNA J. FLORES,

VS.

Defendant/Appellant.

Case No. 20080102-CA

SEP - 5 2008

SEADHNA J. FLORES,)	BRIEF OF APPELLEE
)	
Plaintiff/Appellee,)	
)	
vs.)	
)	
DAVID G. EARNSHAW,)	
)	
Defendant/Appellant.)	Case No. 20080102-C A

|| | From Order and Judgment Entered January 14, 2008
 || | District Court, Ogden Department, Weber County, Utah
 || | By the Honorable Michael D. Lyon

Attorney for Appellee

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
I. DID THE TRIAL COURT CORRECTLY CONCLUDE THAT THE REAL ESTATE PURCHASE CONTRACT WAS AMBIGUOUS AS IT RELATED TO SUBJECT MATTER?.....	1
II. DID THE TRIAL COURT CORRECTLY FIND THAT THE PURCHASE PRICE, AS STATED IN THE REAL ESTATE PURCHASE CONTRACT, WAS THE PURCHASE PRICE AGREED UPON BETWEEN THE PARTIES AND, IN MAKING THIS FINDING, DID THE TRIAL COURT PROPERLY EXCLUDE THE PRICE EVIDENCE OFFERED BY DEFENDANT?.....	1
III. PLAINTIFF IS ENTITLED TO ADDITIONAL ATTORNEY’S FEES ON APPEAL	1
STATEMENT OF THE CASE	1, 2
FACTS	2, 3
SUMMARY OF ARGUMENTS	3
I. THE REPC WAS AMBIGUOUS AS TO SUBJECT MATTER.....	3, 4, 5, 6, 7
II. THE TRIAL COURT’S FINDING AS TO CONTRACT “PRICE” IS SUPPORTED BY THE RECORD AND BY THE PROPER APPLICATION OF THE RULES OF EVIDENCE.....	7, 8, 9
III. PLAINTIFF IS ENTITLED TO ATTORNEY’S FEES INCURRED AS A RESULT OF DEFENDING THIS CASE ON APPEAL.....	9
CONCLUSION.....	10
CERTIFICATE OF MAILING	10
ADDENDUM “A”	11

TABLE OF AUTHORITIES

	<u>PAGE</u>
Case Law:	
<u>Fitzgerald vs. Corbett</u> , 793 P.2d 356, 358 (Utah 1990)	4, 9
<u>Hoffman vs. Life Insurance Company</u> , 669 P.2d 410 (Utah 1983)	7
<u>Interwest Construction vs. Palmer</u> , 923 P.2d 1350, 1358-59 (Utah 1996)	1
<u>Peterson vs. Sunrider Corp.</u> , 202 Utah 43, 48 P.3rd 918 (2002)	1, 4
<u>Re: Sonnenreich</u> , 204 (Utah), Page 3, Paragraph 45, 86 P.3rd 712	9
<u>Ward vs. Intermountain Farmers Association</u> , 907 P.2d 264, 268 (Utah 1995)	4
Statutes:	
Utah Code Annotated, §78A-4-103(2)(j)	1
Utah Code Annotated, §78B-5-826 (formally §78-27-56.5)	1, 9
Other Authorities:	
<u>Corbin on Contracts</u> , §24.11	Addendum “A”

JURISDICTION

The Court of Appeals has jurisdiction in this matter under Utah Code Annotated, §78A-4-103(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

DID THE TRIAL COURT CORRECTLY CONCLUDE THAT THE REAL ESTATE PURCHASE CONTRACT WAS AMBIGUOUS AS IT RELATED TO SUBJECT MATTER?

Whether a contract is ambiguous is a question of law, which is reviewed for correctness. [Interwest Construction vs. Palmer, 923 P.2d 1350, 1358-59 (Utah 1996).]

II.

DID THE TRIAL COURT CORRECTLY FIND THAT THE PURCHASE PRICE, AS STATED IN THE REAL ESTATE PURCHASE CONTRACT, WAS THE PURCHASE PRICE AGREED UPON BETWEEN THE PARTIES AND, IN MAKING THIS FINDING, DID THE TRIAL COURT PROPERLY EXCLUDE THE PRICE EVIDENCE OFFERED BY DEFENDANT?

In reviewing the Trial Court's contract interpretation, we defer to the Trial Court on questions of fact but not on questions of law. [Peterson vs. Sunrider Corp., 202 Utah 43, 48 P.3rd 918 (2002).]

III.

PLAINTIFF IS ENTITLED TO ADDITIONAL ATTORNEY'S FEES ON APPEAL

Utah Code Annotated, §78B-5-826. (Formally, Utah Code Annotated, §78-27-56.5.)

STATEMENT OF THE CASE

This is an appeal from a Bench Trial Decision in favor of Plaintiff, SEADHNA J. FLORES,

on his action for Specific Performance of a Real Estate Purchase Contract between himself and Defendant, DAVID G. EARNSHAW. The Trial Court correctly found that, under the terms of their contract, Defendant agreed to sell Plaintiff a newly constructed “built-out” condominium for the stated purchase price of \$144,950.00. The Trial Court also dismissed Defendant’s “wrongful lien” Counter-Claim (R.136). That part of the Trial Court’s ruling has not been appealed.

FACTS

Plaintiff has some dissatisfaction with Defendant’s “Statement of Case”, because Defendant’s statement not only recites portions in the course of proceedings below and facts relevant to the issues he raises on appeal, but said statement is also replete with argument and innuendo.

Beginning on page 4 of his Brief, Defendant points not to facts elicited during testimony but, instead, to comments from the Trial Judge and to exchanges between the Trial Court and counsel during closing arguments. For the next four pages (from the middle of page 4 to the middle of page 7), Defendant refers to these exchanges, presumably to argue that the Court was unsure of the proper application of the law and that, in the end, found against Defendant’s position because of its alleged confusion.

“However, it is clear that the trial court was confusing the concept of contract interpretation with integration.” (Defendant’s [Appellant’s] Brief, page 6.)

The exchange between counsel and the Trial Court during closing argument are not facts in evidence relevant to the issues presented on appeal. In any event, Defendant’s argument that the Court was confused and committed error in its decision is not warranted by the facts or the record, as will be hereinafter demonstrated.

Defendant does properly recite facts from the record (beginning on page 8 of his Brief) in support of his claim that the findings of the Court relating to “contract price” were not supported by the evidence and, therefore, clearly erroneous. (Pages 8 through 16 of Defendant’s [Appellant’s] Brief.) However, and in summary, the parties each told the Trial Court a different story as to contract price and contract price only. In the end, the Court found that the price agreed-upon was the amount found in their Real Estate Purchase Contract, the amount that Plaintiff testified was, in fact, their bargain. As will be pointed out, the Court’s finding on this issue is supported not only by the evidence, but by the application of the parol evidence rule concerning admissibility, as detailed below.

SUMMARY OF ARGUMENTS

The Trial Court correctly concluded that the Real Estate Purchase Contract (“REPC”) was ambiguous as to subject matter. The Trial Court properly considered parol and other extrinsic evidence in resolving this ambiguity. The Trial Court’s finding as to contract price is supported by the evidence and by the proper application of evidence rules. Plaintiff is entitled to attorney’s fees in defending this case on appeal.

ARGUMENT

I.

THE REPC WAS AMBIGUOUS AS TO SUBJECT MATTER

The parties apparently have no disagreement on the law on this issue. The approach the

Court should take is found in Peterson vs. Sunrider.

“If the language of the contract is unambiguous, the intention of the parties may be determined as a matter of law based upon the language of the agreement . . . , a contract provision is ambiguous if it is capable of more than one reasonable interpretation because of “uncertain meanings of terms, missing terms or other facial deficiencies.”

“In determining whether a contract is ambiguous, the court is not bound to consider only the language of the contract. Any relevant evidence must be considered, so that the court can place itself in the same situation the parties found themselves at the time of contracting. The only evidence relevant to that inquiry is evidence of the facts known to the parties at the time they entered the agreement.” [Peterson vs. Sunrider Corp., 48 P.3d 918, 925 (Utah 2002).] (Citations omitted.)

Peterson vs. Sunrider went on to say:

“If, after considering such evidence, the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify ambiguous terms. Conversely, if, after considering such evidence, the court determines that the language of the contract is not ambiguous, then the parties’ intentions must be determined solely from the language of the contract.” Id (Quoting Ward vs. Intermountain Farmers Association, 907 P.2d 264, 268 (Utah 1995).]

“Questions of whether a contract is ambiguous because of uncertain meaning of terms, missing terms or facial deficiencies or questions of law that must be determined by the court before parol or extrinsic evidence may be admitted to clarify the contractual intent of the parties. Questions of intent, as determined by extrinsic evidence or questions of fact to be cited by the trier of fact . . .” [Fitzgerald vs. Corbett, 793 P.2d 356, 358 (Utah 1990).]

It is evident that the Trial Court recognized it was bound by these principles, since the above recital was taken directly from the Court’s Memorandum Decision. (R.99, 100.)

Defendant’s argument is that the Trial Court was confused as to the concepts of contract “interpretation” versus contract “integration” and, based upon said confusion, reformed an

unambiguous contract. In arguing this position, the Defendant cites a portion of the Trial Court's Memorandum Decision, wherein the Court found the REPC ambiguous as to "subject matter", but unambiguous as to contract price. In making this correct determination, the Trial Court unfortunately used the term "fully integrated", instead of "unambiguous" in referring to contract price. (R.101.)

Defendant implies from this language in the Trial Court's Memorandum Decision that the Court was confused, and that this confusion led to its decision to simply read out of the contract the provision relied upon by Defendant in defense of his position. To the contrary. The parties had always agreed, and the Court ultimately found that the REPC was fully integrated. (Paragraph 11, Findings of Fact.) (R.131, 132.) Fully integrated simply means that a written contract references the parties, the subject matter and the consideration. In the case at hand, the parties agreed, and the Trial Court found, that there was an integrated contract. The disagreement was over clarity as to subject matter.

Defendant's other approach is to suggest that the Trial Court simply read out paragraph 1.1 of the REPC. This argument, again, is based on exchanges between the Trial Court and Defendant's counsel during closing argument. Contrary to Defendant's argument on this issue, in the end the Trial Court did not read out the stated provision or attempt to reform the contract. The Trial Court was very careful to point out that paragraph 1.1 was found in a form of contract normally used for

the sale of an existing residential property that was likely to contain many, if not all, of the items listed in said paragraph. Indeed, Plaintiff had argued at Trial that, under the circumstances, the Court could, theoretically, treat said paragraph as “surplusage”. (TR.153, 154.) but pointed out, in the alternative, that such language was in conflict with other provisions in the contract and the circumstances of the parties and the then status of the project.

In the end, “ambiguity”, as to subject matter, was the approach that the Trial Court took. (Pages 5, 6 and 7 of Memorandum Decision.) (R.99, 100, 101.); (See also paragraphs 17, 18 and 19 of Findings of Fact.) (R.133.); (Finally, see paragraphs 1, 2 and 3 of Conclusions of Law.) (R.135.) In summary, paragraph 1.1 of the REPC conflicts, not only with circumstances then-existing between the parties and the status of the project, but also with paragraph 10.2 of the contract which, on its face, suggests that improvements contained in paragraph 1.1 are part of the contract.

Also, in using Defendant’s strict approach in his interpretation of paragraph 1.1 of the contract, it could be argued that Defendant is excused from any obligation to Plaintiff inasmuch as paragraph 10.2(e) of the contract provides as follows:

“Seller warrants that the property and improvements . . . will be in the same general condition as they were on date of acceptance.”

In other words, the Defendant is not obligated to deliver anything, since nothing existed on the date the contract was finalized.

Finally, Plaintiff would point out that the form of contract used in this case was selected and

prepared by Defendant. As such, unclear language contained in the contract should be viewed, most strongly, against Defendant, especially where he attempts to use that language to defeat the purpose of the contract. In case of doubt or ambiguity, a contract will be construed, most strongly, against the party who prepared it. [Hoffman vs. Life Insurance Company, 669 P.2d 410 (Utah 1983).]

II.

THE TRIAL COURT’S FINDING AS TO CONTRACT “PRICE” IS SUPPORTED BY THE RECORD AND BY THE PROPER APPLICATION OF THE RULES OF EVIDENCE

Defendant argues that the Trial Court committed error by disregarding evidence (offered by Defendant) that the “built-out” unit both parties contemplated was directly tied to, and inseparable from, the higher price urged by Defendant. Defendant argues that the Trial Court pursued “a rigid and overly formalistic approach to the evidence”. (Appellant’s Brief, page 24.) He argues that the finding of the Trial Court that the agreed price was \$144,950.00 is not supported by the record.

On Defendant’s claim that the Trial Court pursued an overly formalistic approach, let’s examine the facts of the case and the legal principles that the Trial Court employed. First, the Trial Court found that the REPC was fully integrated. That is, that it identified the parties (Plaintiff and Defendant); it stated a consideration (\$144,950.00); and it described subject matter (a new, yet-to-be-built condominium). (Finding No. 11.) (R.131, 132.)

Next, the Trial Court concluded that the contract in describing “subject matter” was “ambiguous” as to the parties’ intent. (Conclusion No. 3.) (R.135.)

Finally, the Court concluded that extrinsic evidence was needed and was admissible in order to determine the intent of the parties as to subject matter but not as to “contract price”. (Conclusion No. 4.) (R.135.)

Plaintiff submits that the Trial Court properly applied the rules of evidence in formulating its Ruling. The Trial Court posed this “evidence issue” during closing arguments. The Trial Court asked the following substantive question in an exchange with both counsel, requesting post-trial memoranda on the subject matter, namely: If there is ambiguity as to subject matter, and extrinsic evidence is allowed to resolve that ambiguity, can the Trial Court then entertain extrinsic evidence in examining other provisions or parts of the contract that, to the Court, are clear and unambiguous? (See TR, pages 169 through 179.)

Plaintiff addressed this issue in a “Post-Trial Memorandum” filed in this case prior to the Trial Court’s Decision. (R.82-89.) (See Addendum “A”.) Plaintiff incorporates herein the arguments contained in said Post-Trial Memorandum. In summary, the Trial Court did apply the correct legal principles in declining to consider Defendant’s extrinsic evidence on the issue of price. In the end, the Trial Court became aware that there was uncertainty as to the meaning of the language used by the parties in their contract as to subject matter, and, as a process of interpretation, received evidence concerning antecedent communications and agreements, both oral and written (Option Agreement, Plaintiff’s Exhibit “1”); website information (Plaintiff’s Exhibit “7”) and considered

other factors in assisting it in determining the parties' intent on that matter. Having done that, the Trial Court properly excluded, under the parol evidence rule, extrinsic evidence that attempted to alter or vary the clear and explicit terms of the contract relating to purchase price.

Even assuming the Trial Court had considered Defendant's evidence as to contract "price", there is sufficient evidence in the record to support the Trial Court's Decision on this issue. At Trial, Plaintiff testified, extensively, as to contract price. (TR, pages 25 through 29; also, 43, 44.) In addition, the initial Option Agreement listed the price as claimed by Plaintiff. (TR, pages 38, 39.) Finally, there was the evidence of the REPC, itself, supporting Plaintiff's position. (TR, page 46.)

This evidence was all considered and included in the Trial Court's Findings of Fact. (R.130 through 132.) The Trial Court concluded that Plaintiff's testimony regarding his agreement with Defendant "appears reasonable". (R.135, paragraph 2.) The Findings of the Trial Court, in this regard, must be "clearly erroneous" in order to overturn them. [*Fitzgerald vs. Corbett*, 793 P.2d 356, 358 (Utah 1990); and, also, in *Re: Sonnenreich*, 204 (Utah), page 3, paragraph 45, 86 P.3rd 712.]

III.

PLAINTIFF IS ENTITLED TO ATTORNEY'S FEES INCURRED AS A RESULT OF DEFENDING THIS CASE ON APPEAL


Under paragraph 17 of the REPC and pursuant to Utah Code Annotated, §78B-5-826 (formally, Utah Code Annotated, §78-27-56.5), Plaintiff is entitled to reasonable attorney's fees in defending this case on appeal.

CONCLUSION

The Trial Court correctly concluded that the REPC was ambiguous, as to contract “subject matter” and correctly interpreted the parties’ intent and resolved that issue in Plaintiff’s favor. The Trial Court correctly applied the rules of evidence in considering and ruling on the issue of contract “price”, and the evidence and record otherwise supports the Findings of the Trial Court on that issue. Plaintiff is entitled to additional attorney’s fees on appeal.

The Order and Judgment of the Trial Court should be affirmed, and this case should be remanded to the Trial Court for a determination as to additional attorney’s fees to be awarded and, otherwise, as is consistent with this Ruling.

DATED and signed this _____ day of September, 2008.


MICHAEL F. OLMSTEAD
Attorney for Appellee

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed true and correct copies of the foregoing *Brief of Appellee* to DONALD L. DALTON, Attorney for Defendant/Appellant, Post Office Box 84158, Salt Lake City, Utah, 84158, this 5th day of September, 2008.


Secretary

ADDENDUM “A”

SECOND DISTRICT COURT
2007 OCT -5 PM 1:03

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

SEADHNA J. FLORES,

Plaintiff,

vs.

DAVID G. EARNSHAW,

Defendant.

) **PLAINTIFF'S POST-TRIAL**
) **MEMORANDUM, RE:**
) **EXTRINSIC EVIDENCE**

) Civil No. 060905957

) *Judge* MICHAEL D. LYON

INTRODUCTION

At the end of the Bench Trial in the above matter and during closing arguments, the Court posed the following question to counsel, as the undersigned counsel understood it:

QUESTION: Assuming the Court finds a part or a provision in the contract unclear or ambiguous, and, therefore, allows extrinsic evidence (parol and/or written) for the purpose of clarifying or interpreting the parties' intent with regard to that unclear/ambiguous provision, is the Court then permitted to entertain extrinsic evidence (parol and/or written) for the purpose of examining other provisions or parts of the contract that are, in the Court's mind, clear and

PLAINTIFF'S POST-TRIAL MEMORANDUM, RE: EXTRIN



Plaintiff's Post-Trial Memorandum, Re: Extrinsic Evidence
Civil No. 060905957

unambiguous?

ARGUMENT

Plaintiff believes the Court, in alluding to a provision or a part of the contract in question that is ambiguous or unclear, is referring to paragraph 1 of the Real Estate Purchase Contract ("REPC"), describing the "Property" being purchased. The uncertainty arises because the "Property" is described as "Lot No. 5 of Ogden Downtown Entertainment Center . . . 339 East 2550 South, Unit No. 402 . . ."

Because "Unit No. 402" was yet to be constructed at the time the REPC was signed, the Court properly allowed extrinsic evidence of what the parties intended by that description of the property. Extrinsic evidence included a subdivision plat, conversations between the parties and Internet marketing materials clearly delineating a floor plan (Plan "C" - part of Plaintiff's Exhibit "1") that included built-out items, including sinks, toilets, cabinets, etc. These Internet marketing materials also included a "Features" page that listed a whole litany of built-out items and features. (Part of Plaintiff's Exhibit "1".) In the end, however, the best evidence of what the parties' intentions were with regard to this provision was Defendant's acknowledgment, under cross-examination, that, at the time the REPC was executed by the parties, he fully intended for Plaintiff to receive a fully built-out unit, as per the marketing materials.

The above process used by the Court involved "interpretation" of a contract, as distinguished

from an application of the “parol evidence rule”. As Professor Corbin points out:

“Interpretation consists of ascertaining the meaning that the parties intended to attach to the terms of the contract. The parol evidence rule, in contrast, determines whether the contract can be supplemented by terms agreed upon by the parties prior to or contemporaneously with formation of the contract. That rule governs whether these additional terms will become part of the contract.” [Corbin on Contracts, §24.11.]

Professor Corbin cited Berg vs. Hudesman, 801 P.2d 222, 229 (Washington 1990):

“When interpreting a contract, evidence is admitted, not for the purpose of importing into the writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument.”

“Only when the parties intended meaning is determined is one in an appropriate position to raise the bar of the parol evidence rule to prevent alteration or impingement of the agreement by the asserted contradictory prior or contemporaneous agreement. In other words, interpretation and construction must necessarily proceed protection against forbidden contradiction or modification.” [Garden State Plaza Corp. vs. S.S. Kresge Co., 189 Atlantic 2nd 448, 454 N.J. (1963).]

Professor Corbin summarized as follows:

“When the court is aware that there may be uncertainty as to the meaning of the language agreed upon by the parties, it should, as part of the process of interpretation, welcome testimony concerning antecedent agreements, communications, and other factors that may assist in indicating the parties’ original intentions. Such testimony does not vary or contradict the written words, it determines that which cannot be varied or contradicted. If a question then arises as to whether the parties also agreed upon oral or written terms not contained in the now clear words of the contract, application of the parol evidence rule is warranted. The issue of admissibility of extrinsic evidence in order to interpret a contract is, therefore, distinguishable from the issue of admissibility of extrinsic evidence under the parol evidence rule.” [Corbin on Contracts, §24.11.]

Plaintiff's Post-Trial Memorandum, Re: Extrinsic Evidence
Civil No. 060905957

In the case at hand, both parties offered, and the Court received, extensive and complete evidence with regard to the dealings of the parties', including evidence outside of their contract. At this point, the Court is now obligated to look at and determine the following:

1. Do the parties have an integrated contract? This is a question of law by looking at the four corners of the contract and without the consideration of extrinsic evidence.

2. Assuming the parties have an integrated contract, is any part of that contract unclear or ambiguous? This is also a question of law to be decided by the Court, without considering extrinsic evidence.

3. If the Court determines, as a matter of law, that the parties have an integrated contract but, as a matter of law, the contract, or some part thereof, is unclear or ambiguous, the Court is then free to consider extrinsic evidence of the parties' intent, but only as to that part of the contract which is unclear or ambiguous. This is the process referred to by Corbin as "interpretation".

4. The Court, however, under the parol evidence rule, is without authority to consider extrinsic evidence that conflicts or varies from unambiguous provisions of the integrated REPC.

In the case at hand, the REPC appears to be a full and operative statement of the terms of the parties' agreement. In the contract, Plaintiff and Defendant have assented to the written words therein as a definite operative expression of their intentions. The parties have agreed to the use of these words, but not to any particular meaning of those words.

The parties apparently agree that the REPC is a fully integrated contract, that is, it is a definite operative expression of their intentions, and the Court likely will agree and can rule that the REPC is a fully integrated agreement, as a matter of law, in that it contains (a) parties to the contract, i.e., Plaintiff and Defendant; (b) subject matter of the contract, i.e., a yet unbuilt residential condominium unit; and (c) consideration to be paid or exchanged, namely, \$144,950.00. Where the parties are not in agreement and what the Court has a duty to determine, as a matter of law, is whether the REPC is clear and unambiguous on all terms and conditions, as Defendant claims, or, conversely, is unclear or ambiguous, with respect to subject matter, as Plaintiff claims.

Contrary to the argument made by Defendant in his Supplemental Trial Brief that extrinsic evidence is admissible “for the purpose of determining whether a contract is ambiguous” (page 7 of Defendant’s Supplemental Trial Brief, citing Petersen vs. Sunrider Corporation), this issue can only be determined by the Court, as a matter of law, without the aid of extrinsic evidence. [Interwest Construction vs. Palmer, 923 P.2d 1350, 1358 (Utah Supreme Court 1996).]

In any event, Defendant’s entire case rests on his assertion that there is a fully integrated and unambiguous contract between the parties that only requires Defendant to build Plaintiff a shell of a residential condominium unit for the price of \$144,950.00.

Plaintiff’s position, on the other hand, is that the contract in question is unclear with regard to what the parties intended with regard to the condominium unit yet to be built. Paragraph 1.1 of

Plaintiff's Post-Trial Memorandum, Re: Extrinsic Evidence
Civil No. 060905957

the contract is not applicable to the parties' circumstances and amounts to surplusage, because its language contemplates present items in an existing residence, rather than features in a residential unit that is not yet built. At most, paragraph 1.1 creates ambiguity or uncertainty as to what the parties intended when they contracted for the sale and purchase of Unit No. 402 in a new and as yet to be constructed residential condominium building, as described in paragraph 1 of the REPC. Plaintiff is, therefore, asking the Court to consider the extrinsic evidence produced at Trial showing the parties' intent with regard to this issue, including Defendant's final admission on cross-examination that he intended Plaintiff to receive a fully built-out unit under the REPC.

Having determined the uncertainty of the integrated contract with regard to the parties' intent as to subject matter and having clarified that intent through extrinsic evidence, the Court is then faced with Defendant's closing oral argument that the Court should also consider Defendant's extrinsic evidence with regard to the price that his client claims the parties agreed upon for a built-out unit, namely, \$184,900.00. It is at this point, and on that issue, that the parol evidence rule applies. Keep in mind the parol evidence rule is a substantive rule.

While the Court can consider extrinsic evidence with regard to what the parties intended to be the meaning of uncertain terms that are unquestionably a part of their integrated contract (i.e., Lot No. 405 of the Ogden Downtown Entertainment Center . . . Unit No. 402), the Court is without authority to consider extrinsic evidence that attempts to vary or change unambiguous terms in the

parties' fully integrated contract (i.e., \$144,950.00).

The above principles can be found in the following Utah cases. In Fitzgerald vs. Corbett, a 1990 Utah case out of the Supreme Court, the Court stated as follows:

“Questions of whether a contract is ambiguous because of uncertain meaning of terms, missing terms or facial deficiencies are questions of law that must be determined by the court before parol or extrinsic evidence may be admitted to clarify the contractual intent of the parties. Questions of intent as determined by extrinsic evidence are questions of fact to be decided by the trier of fact and are subject to the “clearly erroneous” standard of review.” [Fitzgerald vs. Corbett, 134 Utah Advanced Reports, Page 4.]

Once a contract is found to be ambiguous, the Court may consider extrinsic evidence to determine its meaning. In Petersen vs. Sunrider Corporation [2002 Ut., 446 (Utah Advanced Reports 40)] cited by Defendant in his Pre-Trial Supplemental Memorandum, the Supreme Court noted as follows:

“A contract’s interpretation may be either a question of law determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent. If a trial court interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under the correctness standard. However, if the contract is not an integration or is ambiguous and the trial court proceeds to find facts respecting the intentions of the parties based on extrinsic evidence, then our review is strictly limited.” [At Page 42.]


SUMMARY AND CONCLUSION

The answer to the Court’s question is “no”. The Court may not consider extrinsic evidence that varies from clear and unambiguous terms of the contract under the parol evidence rule, even though it has considered extrinsic evidence as to the intent of the parties’ with regard to provisions

Plaintiff's Post-Trial Memorandum, Re: Extrinsic Evidence
Civil No. 060905957

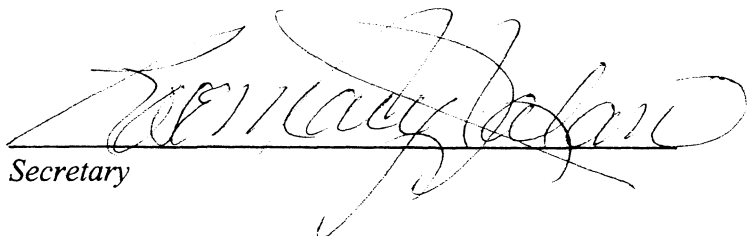
in an otherwise fully-integrated contract that the Court finds ambiguous. The Court has a duty to consider extrinsic evidence to "interpret" and clarify with regard to the unclear part, but also has a duty, under the parol evidence rule, to ignore extrinsic evidence that would vary terms of the contract that are clear and unambiguous.

RESPECTFULLY SUBMITTED this 5 day of October, 2007.


MICHAEL F. OLMSTEAD
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing *Plaintiff's Post-Trial Memorandum, Re: Extrinsic Evidence* to DONALD L. DALTON, Attorney for Defendant, Post Office Box 58084, Salt Lake City, Utah, 84158, this 17 day of October, 2007.


Secretary